(16)

No. 04-108

Supreme Court, U.S.
FILED
DEC 2 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SUSETTE KELO, *ET AL.*
Petitioners,

v.

CITY OF NEW LONDON, CONNECTICUT, *ET AL.*
Respondents.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is condemned, not to eliminate slums or blight, but for the sole purpose of economic development that will perhaps increase tax revenues and improve the local economy?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. THE PUBLIC USE REQUIREMENT OF THE FIFTH AMENDMENT MUST BE READ IN LIGHT OF THE OBJECTIVES OF THE TAKINGS CLAUSE. 10

II. THE PUBLIC USE REQUIREMENT PERMITS TAKINGS ONLY FOR TRADITIONAL GOVERNMENT FUNCTIONS AND IN CASES WHERE HOLDOUT COSTS EXCEED THE DIMINUTION IN SOCIAL VALUE THAT RESULTS FROM THE TAKING. 11

A. The Public Use Requirement Is Satisfied In Cases In Which The Government Owns And Operates Property For The Public At Large 11

B. The Public Use Requirement Is Met When Certain Condemned Property Is Transferred To Common Carriers For Use By The Public At Large 12

C. The Public Use Requirement Allows Condemnation In Additional Limited Cases Where The Holdout Problem Is Acute But Owners' Subjective Values Are Not Compensated. 13

D. Condemnation For Blight Does Not Meet The Standard For Public Use. 16

III. THE PUBLIC USE LANGUAGE OF THE TAKINGS CLAUSE PROHIBITS THE TAKING OF PRIVATE PROPERTY FOR ECONOMIC DEVELOPMENT. 19

A. The Loss Of Subjective Value Far Outweighs Any Holdout Problem Both Generally And On The Facts Of This Case. 20

B. There Is No Net Public Benefit That Conceivably Justifies The Taking Of Petitioners' Homes In The Name Of Public Improvement. 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES **Page(s)**

Armstrong v. United States, 364 U.S. 40 (1960) 12, 21

Berman v. Parker, 348 U.S. 26 (1954) ..... *passim*

Cincinnati v. Vester, 281 U.S. 439 (1930) 28

City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 30

Clark v. Nash, 198 U.S. 361 (1905) 14, 15

County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) ..... *passim*

Daniels v. Area Plan Comm'n, 306 F.3d 445 (7th Cir. 2002) 19

Dohany v. Rogers, 281 U.S. 362 (1930) 21

Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) 10, 28, 29

Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885) 14

In re Slum Clearance, 50 N.W.2d 340 (Mich. 1951) 17

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 14

Kelo v. City of New London, 843 A.2d 500 (Conn. 2004) ("*Kelo II*") ..... *passim*

Kelo v. City of New London, 2002 Conn. Super. LEXIS 789 (Conn. Super. Ct. March 13, 2002) ("*Kelo I*") ..... *passim*

Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) 21

Midkiff v. Tom, 471 F. Supp. 871 (D. Haw. 1979) 29

Pennell v. City of San Jose, 485 U.S. 1 (1988) 10

Olmstead v. Camp, 33 Conn. 532 (1866) 14

Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) 8

Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906) 15

United States v. Bodcaw Co., 440 U.S. 202 (1979) 21

United States v. Lopez, 514 U.S. 549 (1995) 17, 18

West 41st St. Realty LLC v. N.Y. State Urban Dev. Corp., 298 A.D.2d 1 (N.Y. App. Div. 2002) 18, 19

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 5, 10

CODES AND STATUTES

Conn. Gen. Stat. § 8-125(b) 18

Conn. Gen. Stat. § 8-186 5

D.C. Code Ann. § 5-701 (1945) 18

D.C. Code Ann. § 5-719 (1945) 18

Haw. Rev. Stat. § 516-1(14) (1976) 29

Haw. Rev. Stat. § 516-33(a)(4) (1976) 29

Haw. Rev. Stat. § 516-83(5) (1976) 29

New Hampshire Mill Act, 1868 N.H. Laws ch. 20, § 3 14

OTHER AUTHORITIES

Bruce A. Ackerman, *Private Property and the Constitution* (1978) 16

Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (1904) 17

Kate Moran, *City to Assess State of Fort Trumbull Development; Eminent Domain Lawsuit Not the Only Source of Frustration*, The Day, September 30, 2004 ..... 3, 26, 27

Kate Moran, *Developer Says Fort Trumbull Hotel Plan Not Viable Since 2002; Project Became Unrealistic Without Pfizer Commitment*, The Day, June 12, 2004 ..... 4, 27

Kate Moran, *Fort Trumbull Developer Declares NLDC in Default of Contract*, The Day, June 15, 2004 ..... 4, 26, 27

Kate Moran, *With Vacant Lots and Cash Needs, NLDC Reaches a Crucial Juncture*, The Day, January 18, 2004 ..... *passim*

Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599 (1949) 16

Plffs.' Exhibit TT 23, 24

Plffs.' Exhibit VV 23

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).....16

Resps.' Opp. to Pet. Cert.....5, 24

Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986).....15, 16

W.W. Blackstone, 1 *Commentaries on the Law of England* (1765).....21

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the proposition that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, the annual *Cato Supreme Court Review*. Counsel of Record for this brief is Professor Richard A. Epstein, a leading constitutional law scholar. The instant case raises squarely the question of the limits on state governments' power under the Takings Clause and is thus of special interest to the Cato Institute and its Center for Constitutional Studies.

STATEMENT OF FACTS

This lawsuit arises out of a protracted dispute over whether local governments and the municipal corporations they create use their eminent domain power for "public use" when they take private homes and businesses under a comprehensive urban renewal plan that "perhaps" will reverse decades of decline in an economically distressed city.

In 1998, the City of New London, Connecticut (hereinafter "New London"), and the New London

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

Development Corporation (hereinafter "NLDC"), a private nonprofit corporation, instituted condemnation proceedings to create a 90-acre development park in the Fort Trumbull section of New London, located along the Thames River. *See, e.g., Kelo v. City of New London*, 843 A.2d 500, 508 (Conn. 2004) (hereinafter "*Kelo II*").[2] The project stands next to the New London Mills site on which Pfizer, Inc., a private for-profit corporation, had at the time intended to build a global research facility—completed in fact in 2001. *Id.* at 508-09. That 90-acre site included approximately 115 privately owned land parcels; a 32-acre parcel on which stood the United States Naval Undersea Warfare Center, no longer in operation; and a regional water pollution control facility. *Id.* at 509. NLDC claimed that its Fort Trumbull Municipal Development Plan (hereinafter "NLDC Plan" or "plan") would "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's water front, and eventually 'build momentum' for the revitalization of the rest of the city, including its downtown area." *Id.*

The NLDC Plan contains seven different parcels dedicated to a mix of public and private uses. The main elements of the project—including the proposed new hotel, the marina, and much of the office space—were slated to be undertaken on property that was *immediately* available.[3] But the respondents have nonetheless delayed the project in an effort to obtain the property of private homeowners.

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[2] Due to unavailability of the joint appendix, all citations to the record refer to the reported opinions of and the page numbers of the record certified in the courts below.

[3] For a map of parcel ownership and location, *see* Kate Moran, *With Vacant Lots and Cash Needs, NLDC Reaches a Crucial Juncture*, The Day, January 18, 2004, at A1 & graphic (graphic illustrating NLDC and/or state ownership of all but parcels 3, 4A, and 5C) (hereinafter "*Vacant Lots*"). For intended uses of each parcel, *see Kelo II*, 843 A.2d at 509-11.

The crux of the controversy has focused on two parcels—parcels 3 and 4A—on which these private owners reside.[4] Parcel 3 was designated as the proposed site for an ostensible 90,000 square foot complex devoted to high tech research, office space, and parking, and was intended to complement the new Pfizer facility, which was built several hundred feet to the south of the parcel. Resps.' Opp. to Pet. Cert. at 5. Located in the center of parcel 3 is the Italian Dramatic Club, a private organization. *Kelo II*, 843 A.2d at 509. It was spared from demolition while petitioner Brelesky's home, which abuts it, was slated for immediate destruction even though *no* plans for its redevelopment have been made. *See, e.g., id.* at 566 (discussing differential treatment of club and homes); *id.* at 573 (under NLDC plan, the "office buildings will not be constructed [on parcel 3] unless a market develops for them").

Several of the plaintiffs are located on parcel 4A, which is separate and apart from the large plots of land already in public hands. Resps.' Opp. to Pet. Cert. at 6. The original development plan called for the *immediate* destruction of those homes, without any designation for that land's future use apart from the vague suggestion the parcel will further "park support." *Id.* at 5.

The original project costs included $73 million appropriated by the state of Connecticut.[5] Under the plan, the NLDC proposed a 99-year ground-lease with a developer, Corcoran Jennison. *Kelo II*, 843 A.2d at 554. Covering these parcels, the proposed lease stipulated a rent of $1 per year and obligated the firm to develop and market the project in accordance with the overall plan. *Id.* The original agreement with Corcoran Jennison did not include any

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[4] Together the homes at issue cover approximately 1.5 acres of the entire 90 acre site. *See, e.g., Kelo II*, 843 A.2d at 553 (four homes on parcel 3 occupy three-quarters of an acre); *id.* at 570 (homes on parcel 4A occupy .76 acres).

[5] *See* Moran, *Vacant Lots*, The Day, January 18, 2004, at A1.

particular timetable for the development of any portion of the project; in fact, it allowed the developer to control the pace of development and the selection of tenants. *See, e.g., Kelo II*, 843 A.2d at 551 & n.76. Today, the project scope and timetable remain unsettled, and any proposal for the four-star hotel has been shelved until July 2005 at the earliest.[6] That proposal may yet be abandoned because in the meantime Pfizer has found other hotel sites.[7] Nor has work begun on the proposed office buildings, parking lots, private homes, or river walk (which must be completed, at a cost between $500,000 and $700,000, for the hotel to be built.)[8]

The NLDC has contended that the plan would "generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs." Resps.' Opp. to Pet. Cert. at 6. It also has claimed, with no time specification, that the plan would raise between

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[6] Kate Moran, *City to Assess State of Fort Trumbull Development; Eminent Domain Lawsuit Not the Only Source of Frustration*, The Day, September 30, 2004, at A5 ("Under the terms of the settlement [reached between Corcoran Jennison and NLDC in September 2004], Corcoran Jennison . . . has to submit plans for the hotel to the Planning and Zoning Commission by July 2005.") (hereinafter "*Source of Frustration*").

[7] Kate Moran, *Developer Says Fort Trumbull Hotel Plan Not Viable Since 2002; Project Became Unrealistic Without Pfizer Commitment*, The Day, June 12, 2004, at C4 ("By July 2002 . . . Pfizer had been open in New London for a year, and it had found other hotels in the area . . . . With that demand met, and with the corporate landscape altered, the company [informed] Corcoran Jennison that the justification for the hotel was 'no longer apparent.'") (hereinafter "*Hotel Plan Not Viable*").

[8] Moran, *Vacant Lots*, The Day, January 18, 2004, at A6. Corcoran Jennison and NLDC spent much of the last two years squabbling. Kate Moran, *Fort Trumbull Developer Declares NLDC in Default of Contract*, The Day, June 15, 2004, at C1 (detailing NLDC allegations that Corcoran Jennison "had defaulted on its contract to build a hotel, offices and rental housing on part of the 90-acre peninsula"; and Corcoran Jennison's counter-charges that NLDC had "lagged in some of its responsibilities . . . having failed to complete a walkway along the Thames River that must . . . accompany the hotel") (hereinafter "*NLDC in Default*").

$680,000 and $1,250,000 in tax revenues, which were needed, in part, because some fifty-four percent of the land within the city limits was exempt from local property taxation. *Kelo II*, 843 A.2d at 510. One objective of the program was to replace the jobs lost by the closing of the Naval Warfare Center in 1996. *Id.* at 510-11.

The NLDC approved this ambitious plan in early 2000, but only after rejecting more modest plans running the gamut from no action to smaller office, commercial, and retail projects. *Kelo v. City of New London*, 2002 Conn. Super. LEXIS 789, at *219 (Conn. Super. Ct. March 13, 2002) (unpublished op.) (hereinafter "*Kelo I*"). Pursuant to an October 2000 City Council vote, in November 2000 the NLDC instituted condemnation proceedings against those homeowners within the district who had refused to sell under chapter 132 of the General Statutes of Connecticut, § 8-186. Resps.' Opp. to Pet. Cert. at 7. Shortly thereafter, the petitioners brought their lawsuits, which claim (1) that these condemnations were not authorized under the Connecticut statute, and (2) that the proposed takings are not for "a public use" under the Takings Clauses of both the United States and Connecticut Constitutions.

The trial court held that the NLDC was entitled to the private homes located on parcel 3, but had exceeded its powers in condemning the properties located on parcel 4A. *Kelo I*, 2002 Conn. Super. LEXIS 789, at *229-30, *265. The Connecticut Supreme Court, by a four to three vote, affirmed the judgment in favor of New London and the NLDC with respect to parcel 3, and reversed the determination with respect to parcel 4A as an "abuse of discretion," thereby allowing the entire project to go forward in its original form. *Kelo II*, 843 A.2d at 573. With respect to the substantive issue raised by petitioner, the Connecticut Supreme Court held that the project did not run afoul of the Takings Clause of the Fifth Amendment to the United States Constitution, which provides: "nor shall private property be taken for public use without just compensation." *Id.* at 528

(applying "broad and deferential" standard to uphold the NLDC development plan).

In particular, the court held that the legislature and the NLDC, its lawful delegatee, were entitled to a broad level of deference in their factual findings, even though, concededly, none of the development specifics was in place at the time of the condemnation proceedings. *Id.* at 528 (municipality's determination that taking is for a valid public use deserves "substantial deference," so long as "the appropriate legislative authority rationally has determined [the taking] will promote municipal economic development"). As the dissent wrote, the court's standard of deference was well-nigh unlimited: "[t]he majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough." *Id.* at 602 (Zarella, J., dissenting). In the court's view, the plan had to be considered as a whole, obviating the need to make reference to any specific uses intended for the tracts owned by these plaintiffs. *Id.* at 537 n.50 ("an appropriate public use analysis necessarily requires evaluation of the development plan as a whole—the end result of the sum of its parts"). The three dissenting justices agreed that the plan was devised for a public use, and not for the benefit of Pfizer, but they concluded that nothing in the record showed that the plan would in fact be executed within a reasonable period of time. *Id.* at 600 (Zarella, J., dissenting) (concluding, from review of the record, that "there is no realistic prospect of a future public benefit").

SUMMARY OF THE ARGUMENT

Throughout this litigation, the respondents, whose views were adopted wholesale by the Connecticut Supreme Court, have failed to offer a sound analysis of the "public use" question under the Takings Clause of the Fifth Amendment, for two related reasons. First, their holistic approach to the project did not examine its many components on an individual basis—regarding either the type of property taken

or the purpose to which it would be put. Rather, their above-the-fray approach simply asks whether the NLDC Plan meets some undefined standard of "public benefit"—language far broader than the constitutional language, "public use."

Second, the respondents pair that expansive legal standard with a superficial analysis of the underlying transaction, one that ignores all of its costs while treating its ostensible benefits as though they were guaranteed—when from the outset they have been subject to massive political and economic risk. Indeed, respondents' "public use" test is so broad that no major government initiative fails to meet it, for every large-scale project could be justified in the name of "economic development" even if the plan is a dead loser from the moment of its conception. If government takes the property of A and gives it to B, the transaction is for a *private* use. On its face, the Constitution blocks such a taking, even with compensation. Here the NLDC has proposed no public use, or no use at all, for the plaintiffs' homes.

A sensible disaggregation of the decided cases reveals four separate categories of "public use," of which generalized economic development is surely the most problematic. *See, e.g.*, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). The first two categories map closely the standard economic definitions of nonexcludable, or public, goods. The second two categories, which encompass the definition offered by respondents, do not.

The first category of public uses includes private property taken, owned, and operated by the state for standard public functions, such as military facilities, public highways, public schools, and public hospitals. Public use in such cases is sufficiently straightforward to survive the strictest level of judicial scrutiny. The second category includes cases in which property is taken for subsequent use by other private parties who make it available to the public at large. The common carrier obligations incumbent on railroads, grist mills, and public utilities are usually (but not invariably) subject to direct state regulation on matters of access and

price and are commonly understood as activities for public use, even if privately conducted.

Those two categories are easily distilled into a principle that allows some transfers to private persons, but only in the limited circumstances in which the individual owner has no subjective attachment to the land and the private transferee of the property would face acute holdout problems without the state power of condemnation.

The third category of takings purported to be for public use are those intended to alleviate various forms of "blight" and slum-like conditions. The property taken for such reasons is slated (as in category two) to be reconveyed to private parties, albeit without any restriction on its subsequent use. Rather, the rationale is simply the need to remove the property from its current run-down condition. Takings for such purposes have been explicitly approved by this Court in *Berman v. Parker*, 348 U.S. 26 (1954), and by the recent decision of the Michigan Supreme Court, *County of Wayne v. Hathcock*, *supra*, overruling *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). Although the "blight" rationale is not before this Court, it is our view that it unduly undermines the public use limit on government's condemnation power. The term "blight" suggests that the property has deteriorated into a nuisance-like condition. But if that were the case, then the blight could be eliminated under the traditional police power (through condemnation of dilapidated structures) without the need to pay any compensation at all. *Berman* and *Hathcock*, however, rejected that option. Yet, neither opinion has explained in a satisfactory way why outright transfer of broad swaths of property to another individual who is under no duty to alleviate the blighted conditions should be considered the legally preferred solution to the problem. Nor would any such explanation be remotely convincing: Put simply, the blight rationale opens the gate to state abuse that targets the most vulnerable members of the population.

The state is on still thinner ice in the fourth and final category, which allows the condemnation and destruction of perfectly suitable private homes and businesses, and the permanent displacement of property owners, to make way for grander projects initiated to revitalize an "economically depressed" community. This rationale is deeply problematic. The finding of public use is not subject to any easy judicial verification as in categories one and two. Nor is the range of government action constrained in choosing the objects of condemnation, as in category three. Rather, governments can simply gin up pro forma findings that some benefits are expected from the project in question. Indeed, that's exactly what happened in this case.

The NLDC findings are massively misleading. First, given that the key elements of this project could go forward without using the land of these homeowners, the project's defenders wildly exaggerate the holdout risk. Nor have these homeowners sought to extort money from public bodies. They want simply to be left alone, to preserve their homes against state takeovers that would leave them financially ruined and psychologically devastated. In "economic development" cases, like the case at bar, the appropriate balance is struck if the state is allowed to take vacant land for public use only when *serious* assembly problems exist. Put another way, the state's takings power is at its highest when the holdout problem is the greatest and the risk of undercompensation is the least. It is at its low ebb on facts like these, where the threat to subjective value is great and the holdout issue is trivial.

Second, the respondents assert that their claim that the project will produce some net social benefit deserves substantial deference. Yet, deference to respondents' cursory economic analysis would be wholly inappropriate. Respondents fail to identify and quantify the relevant *costs* associated with the improvements, for instance. Those costs and risks properly include massive state subsidies needed to make the project viable; the uncertainty that the project will be completed in its original form; the possibility of failure;

and the full financial and psychological costs—inadequately valued under current law—to the private owners driven from their homes and businesses. Respondents' lopsided analysis of costs and benefits must be categorically rejected. Petitioners are entitled to keep their homes.

ARGUMENT

I. THE PUBLIC USE REQUIREMENT OF THE FIFTH AMENDMENT MUST BE READ IN LIGHT OF THE OBJECTIVES OF THE TAKINGS CLAUSE.

The public use language is an essential part of the Takings Clause, which reads: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. That clause represents a coherent compromise between the private owners' right to retain or dispose of their property at will, and the state's need to supply the public with collective goods that ordinary markets cannot provide. The clause gives the state the extraordinary power to take private property from ordinary people against their will, but checks that power in three critical ways. First, the taking in question should be done only for a public use. Thus, the state may not insert itself in the middle of a transaction whereby it uses its power against one of its citizens in order to advance the private interests of another. "[T]he Court's cases have repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Second, the taking cannot be made *simply* on a showing of public convenience or necessity, but must always be accompanied by compensation. By properly pricing the takings process, state actors will not engage in public projects whose net benefits exceed their costs. *See Pennell v. City of San Jose*, 485 U.S. 1, 22-23 (1988) (Scalia, J., dissenting) (noting that the just compensation requirement ensures that state actors will not be able to hide behind "off-budget" financing but rather must make their deliberations in

response to an open political process). Third, states possess an alternative means of protecting public and private rights: the traditional state police power, which allows the state to limit the use of private property in order to protect others against harmful actions such as ordinary nuisances. If this three-part scheme is rightly applied, the state will initiate only those projects that work for long term public advantage, while ensuring an equal division of the overall gains.

II. THE PUBLIC USE REQUIREMENT PERMITS TAKINGS ONLY FOR TRADITIONAL GOVERNMENT FUNCTIONS AND IN CASES WHERE HOLDOUT COSTS EXCEED THE DIMINUTION IN SOCIAL VALUE THAT RESULTS FROM THE TAKING.

It is critical to put this case in context by first determining how "public use" applies in circumstances that differ from those at issue here. Accordingly, our analysis proceeds in incremental fashion, starting with the easiest public use cases and then moving to more difficult cases.

A. The Public Use Requirement Is Satisfied In Cases In Which The Government Owns And Operates Property For The Public At Large.

The paradigmatic cases for public use involve the taking of private property for facilities that are then owned by the government and operated for the benefit of the public at large. Such cases include the full range of government facilities, offices, and military bases. The list also includes public highways and parks open to the public, whether with or without a fee. In some of these cases the government acquires needed land or facilities by voluntary transactions because the land is relatively compact and the number of usable sites is very large. In such cases, the eminent domain problem is circumvented because it is easier and cheaper for both the government and the private parties to rely on voluntary transactions that avoid the delay and expense typically associated with condemnation proceedings.

In some instances, chiefly those that deal with the acquisition of key sites for military purposes, or land needed for public highways or utilities, the voluntary route, although desirable, is often not attainable. The success of a network operation depends on combining property held by many different persons under a single owner. No one could assemble the land for a transcontinental highway if each individual landowner in the project's way could hold up the project until the government met his asking price for his land. The eminent domain power negates that holdout problem by allowing the government to take the land by force (a power that in many cases will induce parties to transfer the land by settlement.) Here the adoption of a just compensation system (on which more later) protects against the risk that the individuals whose properties lie in the path of a development program will bear more than their proportionate share of the burden. That furthers the overarching purpose of this clause: "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As long as the compensation is rightly determined, the Takings Clause guards against both private holdouts *and* government expropriation.

B. The Public Use Requirement Is Met When Certain Condemned Private Property Is Transferred To Common Carriers For Use By The Public At Large.

The second category of takings for public use introduces a complication because the property taken does not remain with the government but is transferred to some private party or, alternatively, condemned by that party acting under government authorization. Here the Takings Clause guards against an automatic rule that private property taken by eminent domain must remain in public hands. The operative phrase is "public use," which is distinct from, and broader than, the phrase "public ownership." That difference allows for private ownership that facilitates use by the public. It reflects a profound appreciation for the holdout and assembly

problems in network industries, no matter who runs the integrated operation. It would be a major mistake to insist that all railroads, canals, and utilities be publicly owned in order to invoke the state's eminent domain power to overcome the holdout problems that block the formation of a unified network. Why risk inefficient operations when a better system is available—namely, private operation, where the property taken is open to the public at large on a reasonable and nondiscriminatory basis. As was noted in *Hathcock*, if a railroad "must lay track so that it forms a more or less straight path from point A to point B," the takings power must be available to deal with any landowner who "holds out—say, for example, by refusing to sell his land for any amount less than fifty times its appraised value." 684 N.W.2d at 781-82.

C. The Public Use Requirement Allows Condemnation In Additional Limited Cases Where The Holdout Problem Is Acute But Owners' Subjective Values Are Not Compromised.

The public use language has been extended beyond common carrier situations to cover some limited cases where the assembly problem is likely to be acute even if the property acquired is not uniformly subject to state regulation on access and rates. This situation is best illustrated by the nineteenth century cases that ask whether condemnation of private property for the operation of privately owned grist mills counted as a taking for a public use. In these cases, the critical obstacle was one of coordination. The water power for a grist mill came from raising a "head" of water behind a dam, forming a lake. That lake would routinely exceed the standard size of an efficient farm, and therefore necessarily flood lands owned by other individuals. In addition, setting up a grist mill in one location necessarily precluded building similar facilities upstream or downstream from that site. Someone therefore had to decide the location to be exploited.

The degrees of freedom here were narrowly constrained by the topography, and the solution approved in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885), allowed a local commission to accept or reject applications for a grist mill so as to avoid the overbuilding problem. That commission also determined the height of the dam, which in turn limited the amount of flooding. The statute in that case also required the chosen mill owner to pay any flooded landowner a sum fifty percent *above* the market value of the property taken. New Hampshire Mill Act (hereinafter "Mill Act"), 1868 N.H. Laws ch. 20, § 3, quoted in 113 U.S. at 9-10 & note. That land was typically ordinary farmland (and never, to our knowledge, private homes or businesses.) The New Hampshire statute in *Head* also treated grist mills like traditional public utilities by requiring their owners to process the grain of all comers on a nondiscriminatory basis "at tolls fixed by law." *Head*, 113 U.S. at 19.

This last provision satisfied the narrow definition of public use because the owner of the grist mill was denied the right to exclude that is generally regarded as the hallmark of private property. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Yet even if that requirement had been dropped—as it was in some cases in which the mill owner was "under no legal obligation to permit the public to have access to [the mill], or to grind for them if he chose to decline to do so" (*Olmstead v. Camp*, 33 Conn. 532 (1866), discussed at 1866 Conn. LEXIS 532, at *8-9 (1866) (findings of statutory committee))—the statute could have been sustained on grounds far narrower than needed to salvage the NLDC Plan. For, in practice, the absence of a legal obligation to serve did not ordinarily deny uniform service to the public at large. And the difficulties of assembling property were compelling.

Exactly this pattern is observed in some of the early decisions of this Court. Thus, in *Clark v. Nash*, 198 U.S. 361 (1905), this Court held that the public use requirement was satisfied by a taking of land for an irrigation ditch that was "absolutely necessary" to service a plot of land that was

otherwise arid and valueless. *Id.* at 370. And a year later the same result was reached, and for the same reason, when this Court held that an aerial right-of-way could be condemned to take ore from a mine to a railway. *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906). In those and other cases the subjective value of the land taken was virtually zero, while the location of the mine or the farms dictated the property that had to be taken. In neither *Clark* nor *Strickley* did this Court assume that it would be proper to authorize takings beyond the "particular" circumstances at issue, *Clark*, 198 U.S. at 369; rather, the Court stressed the need for "great caution" when assessing the "exceptional times and places" to exercise this power. *Strickley*, 200 U.S at 531.

The gist of this entire line of cases suggests how it is possible to apply the text of the Takings Clause to real world circumstances without doing damage to the purposes of the clause and to the balance it achieves. The words "public use," on their face, appear to be concerned with the ends to which the property is put, not the means that must be invoked to execute the purposes of the clause. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 67 (1986). But the textual argument that "public use" means only use by or for the public-at-large has not prevailed in large measure because of the holdout problem so clearly raised in the Mill Act cases. Any single owner in the affected area on the river could block the construction of the mill by seeking to extract all or most of the gain that comes from its operation. Because potential mill owners had to locate on scarce riverfront sites, the ability to obtain any large social gain required use of state coercion. But that coercion was regulated by the independent commission that determined the height of the dam and, thereby, the lands that could be flooded. In addition, the New Hampshire statute went a long way to protect the subjective value of the original owners by offering them a fifty percent premium over market value. That eased any constitutional doubts about the plan by allowing the parties subject to the coercion to share in the overall social gain, thereby blunting the ethical

objection to allowing those who invoked coercion to garner all the profit from its use. *See* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* ch. 12 (1985). Of course, courts adjudicating outside the domain of such statutes did not require such a steep premium, so long as the money paid left each owner of flooded land as well off as he was prior to the invocation of the power of the state.

To state the matter more generally, however, the public use requirement may be satisfied in those cases in which the invocation of state power promises large social gains without disadvantaging the individuals who are forced to surrender their property for the public benefit. Professor Thomas Merrill puts the proposition in the following fashion: government activities should be invalidated under the public use doctrine in cases where the state trenches on property with high subjective value and state power is not needed to overcome a coordination or assembly problem, especially if the gains (if any there be) are given to a few select individuals without the prospect that they will be distributed to the public at large. *See* Merrill, *Economics of Public Use*, *supra*, at 83-86.

D. Condemnation For Blight Does Not Meet The Standard For Public Use.

Whereas the nineteenth century invocation of "public use" was sharply limited in the fashion suggested by the grist mill cases, during the twentieth century the scope of public use has so expanded that many writers have concluded that the requirement is met so long as the state purpose in question does not run afoul of any other constitutional provision. *See* Bruce A. Ackerman, *Private Property and the Constitution* 190 n.5 (1978). *See also* Note, *The Public Use Limitation on Eminent Domain*: *An Advance Requiem*, 58 Yale L.J. 599, 613-614 (1949). One case of this Court that has been cited in that regard is *Berman v. Parker*, 348 U.S. 26 (1954), which stands for the general proposition that slum clearance or the elimination of "blight," undertaken as part of some larger urban renewal project, satisfies the "public use"

requirement. *See also Hathcock*, 684 N.W.2d at 783 (citing and following *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951) (slum clearance a proper public use)).

That proposition reflects current law, but even if *Berman* survives this Court's decision in this case, the decision below should be reversed because none of the New London petitioners' properties is blighted. Nonetheless, we think that *Berman* is incorrect in principle and believe it important to say why. The power of the state to abate a nuisance in order to protect ordinary citizens and nearby properties from harm has long been accepted. In fact, in *Berman*, Justice Douglas upheld—under the state's *police* power—a comprehensive slum clearance program that took over the plaintiff's department store, located within the designated area, even though that structure was not in a dangerous condition. An elaborate set of legislative findings was said to justify the action under the police power, all reminiscent of the canned findings that were viewed with skepticism by this Court in *United States v. Lopez*, 514 U.S. 549, 562 (1995).

At bottom, these slum clearance cases tend to conflate the police power and the eminent domain power. The standard invocation of the police power limits individual liberty and private property in order to advance the health, safety, morals, and general welfare of the public at large. *See* Ernst Freund, *The Police Power*: *Public Policy and Constitutional Rights* iii (1904) (defining the police power "as meaning the power of promoting the public welfare by restraining and regulating the use of liberty and property"). If individual properties exhibited the characteristics of ordinary nuisances, then the state could force the private owner to correct the situation without having to pay any compensation at all. The law in Connecticut specifies, for example, that the subject property be "deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community." Conn. Gen. Stat. § 8-125(b). But while the police power would allow the state to enjoin the nuisance, without compensation, it would *not*

allow it to take title to the property once the nuisance had been eliminated. Thus, the police power is at once stronger than the eminent domain power (in that it proceeds without compensation) and weaker (in that it does not justify taking title and transferring the property to another private owner for private use). Yet *Berman* in no way addressed this difference. Indeed, the police power and the eminent domain power were at times conflated by the Court, *see, e.g.*, *Berman*, 348 U.S. at 32. At other key junctures the constitutional phrase "public use" was never used; instead, the term "public purpose" (*id.* at 32, 33, 34, 35) was substituted in order to justify a highly deferential standard of judicial review.

The "blight" cases after *Berman* moved far beyond the grist mill cases by allowing condemnation in the absence of any holdout or coordination problems, and without any inquiry into the potential for political abuse from so vast a power. And they repeated *Berman*'s unquestioning acceptance of canned legislative findings. *See, e.g.*, *id.* at 28-29, 33 (accepting, at face value, the pro forma, canned statutory finding of the District of Columbia Redevelopment Act, [D.C. Code Ann. §§ 5-701, 5-719 (1945)], namely, that certain regions of the District of Columbia were dangerous to public health). *Compare Lopez*, 514 U.S. at 562 (refusing to accept at face value findings that certain activities substantially affected interstate commerce).

Broad deference under a lax standard invites powerful local businesses to persuade "neutral" public bodies to declare as "blighted" the property they need for their own business expansion. That is exactly what happened in *West 41st St. Realty LLC v. N.Y. State Urban Dev. Corp.*, 298 A.D.2d 1 (N.Y. App. Div. 2002), *cert. denied*, 537 U.S. 1191 (2003), where the court allowed the condemnation of six contiguous plots of land located on Times Square, which were thereafter leased to the *New York Times* (among other private businesses). There, the aggrieved owners alleged that the City had frustrated their plans to improve their property in order to facilitate its own redevelopment plan. *Id.* at 7.

The New York appeals court nonetheless allowed that taking on the ground that the landowners had not negated the finding of blight. *Id.* The case thus suggests the possibility that the state can *create* the very blight that is said to justify the need for condemnations, and then use that blight to justify a taking designed to satisfy more powerful political interests. *See also Daniels v. Area Plan Comm'n*, 306 F.3d 445, 465 (7th Cir. 2002) (striking down a taking when the commercial buyer was released from a restrictive covenant that applied to the condemnee).

The current broad constitutional standards do not require that any code violations be shown; nor do they suggest that, if such are found, any time has to be given to allow for their corrections. The stability of possession that is so central to any sound system of private property is too often compromised when blight is in the eyes of the beholder. In light of these risks, we can think of no case in which virtually unquestioned deference should be given to a legislature's determination that a taking is constitutional.

III. THE PUBLIC USE LANGUAGE OF THE TAKINGS CLAUSE PROHIBITS THE TAKING OF PRIVATE PROPERTY FOR ECONOMIC DEVELOPMENT.

The difficulties that arise from the broad reading of the public use requirement in the urban blight cases are mightily compounded when the state seeks to use its power to condemn land for the ostensible purpose of economic development. At that point, *no* property is free from the overhang of state condemnation, which creates massive uncertainties for property owners and discourages private investment that could spur the economic improvements that routinely elude flat-footed public planners. Current law goes far beyond using the takings power to overcome holdout and coordination problems like those found in the grist mill cases. And far from providing any economic benefit, most urban development plans authorize huge economic sinkholes. We now address those two points in order.

A. The Loss Of Subjective Value Far Outweighs Any Holdout Problem Both Generally And On The Facts Of This Case.

The "economic development" cases fall far short of coherence on two key elements. First, they do not pay heed to the subjective losses that are sustained by ordinary individuals. Second, they are not a response to holdout problems. Those issues are inherent in all projects of this sort, and they manifest themselves in the sorry history of the NLDC Plan. We first consider the issue in general terms and then turn to specifics.

The Connecticut Supreme Court paid lip service to the importance of subjective values when it wrote: "The trial court was not, and we are not, blind to the social costs of the development plan in the present case. In the words of the trial court: 'An old New London neighborhood with all of its memories, in effect, has been destroyed. People like the plaintiffs have been or might yet be removed from homes they love and in some cases from homes where their families have lived for generations.'" *Kelo II*, 843 A.2d at 540 n.57. But at no point does the Connecticut court give this concern the slightest actual weight.

One sensible way to take these subjective interests into account is to alter the compensation rules to ensure that the individuals who are displaced from their homes are not made to suffer in consequence. That view is not novel. It dates back at least to William Blackstone who, in addressing the obligation to compensate, wrote as follows:

> [T]he public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases, the legislature alone can, and frequently does interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by

> giving him *a full indemnification and equivalent of the injury thereby sustained.* The public is now considered as an individual, treating with an individual for an exchange.

W.W. Blackstone, 1 *Commentaries on the Law of England* 135 (1765) (emphasis added).

This passage is well worth pondering because it sets out a standard for compensation that requires the individual to be left at least as well off after the property is taken as he was before. After all, just that result would take place in a voluntary exchange. Yet, unfortunately, subjective values, which are at their highest in cases of this sort, do not matter at all in setting just compensation in takings cases. *See, e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (just compensation ignores "personal and variant standards as value to the particular owner"). In addition, the modern takings law systematically disregards all other forms of consequential damage such as moving expenses and legal and appraisal fees. *See, e.g.*, *Dohany v. Rogers*, 281 U.S. 362 (1930) (attorney fees); *United States v. Bodcaw Co.*, 440 U.S. 202 (1979) (appraisal fees); *Kimball*, 338 U.S. at 5 (good will).

These restrictive compensation rules work two forms of mischief. First, they result in a systematic unfairness to the individuals who are forced to sacrifice their property to some fuzzy vision of public good—thus leaving unfulfilled the promise of just treatment set out in *Armstrong v. United States*, *supra*. Second, the rules introduce massive distortions into legislative and administrative decisions by setting an explicit set of takings prices that systematically fall below the full costs that are inflicted on the private owner. That leads to two indefensible consequences. First, the individual owner is not left indifferent between the subpar compensation received and the property surrendered, which in turn leads, as here, to strong resistance to takings that might otherwise be accepted. Second, also evident here, the low prices induce government agencies to undertake

excessive condemnation because they do not have to bear the full social costs of their legislative or administrative decisions.

The upshot is too many condemnations with too much social waste and too much government irresponsibility. There is *no* public-regarding reason why economic development has to proceed in blunderbuss fashion just because so-called experts have decreed it to be the policy *de jour*. There is no reason to give any deference to legislative and administrative bodies that act under systematically perverse incentives.

The situation is no better when examined from the side of the government and developers. Where are the holdout risks? Grist mills have to be located on specific sites, but renewal and economic development can take place, and have taken place, anywhere. In many instances it takes place in increments as pioneers buy up old buildings for renovation on a block-by-block basis. The generic nature of the holdout problem is far less, and there is no reason to respond to mere incantations of difficulty unless developers, possessed of a real plan, can demonstrate that recalcitrant landowners are blocking their project. As the Michigan Supreme Court observed in *Hathcock*, "the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain . . . for their formation." 685 N.W.2d at 783-84.

The dangers of moving too quickly are manifest in light of the uncompensated dislocations that are routinely caused. The dangers of moving too slowly are small indeed. The proposed development may never take place at all—a manifest risk in this case. Rather than a rush to condemn willy-nilly, the local government should have a concrete plan, so that private property will not be taken for *no* use at all. Watchful waiting reduces the need for abusive coercive action, because the passage of time may clarify whether some holdout problem persists in fact.

These general considerations are amply confirmed on the grim facts of this case. One look at the various maps of the Fort Trumbull area indicates that holdouts are a complete nonproblem. Located on the site are two large, contiguous properties, now in public hands, that may be used for any purpose under the sun. *See* Plffs.' Exhibits TT, VV (illustrating current and planned uses, and acreage, for the Naval Undersea Warfare Center and adjacent publicly-owned land). Considered either alone, or together, they can accommodate all of the hotel and office space, complete with offsite parking.[9]

Nonetheless, the Connecticut Supreme Court refused to exclude the properties of the individual private owners (spanning about 1.5 acres) from the condemnation plan. "We decline to address the plaintiffs' parcel-specific claims in this context because an appropriate public use analysis necessarily requires evaluation of the development plan as a whole—the end result of the sum of all of its parts." *Kelo II*, 843 A.2d at 537 n.50. But that approach surely is perverse—especially when considered in light of sensible planning procedures. The correct social judgments can be made only if all tradeoffs are made *at the margin*. If ninety-nine percent of the benefits of any economic redevelopment project could be obtained *without* taking these homes, then how is it conceivably rational to insist on taking the remaining private parcels, when that additional government action is the source of untold mischief and yields virtually no benefit at all?

The Connecticut court, relying on expert testimony that "development would be more difficult if these residences were allowed to remain," insisted that the bulldozer adds flexibility to overall planning and development. *Id.* at 555. The ostensible problem adduced by the experts is the

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[9] Under current plans, the hotel will be located on parcel 1; 140,000 square feet (less than four acres) of office space will be located on parcel 5; and an additional 90,000 square feet (a little over two acres) of office space and parking will be located on parcel 3. *Kelo II*, 843 A.2d at 509. The Naval Undersea Warfare Center alone spans 32 acres. *Id.*

difficulty posed by building around existing structures, which putatively interfere with the creation of a uniform whole. But the experts' argument is falsified, in three ways.

First, the homes located on parcel 4A, subject to condemnation for "park support" (Resps.' Opp. to Pet. Cert. at 5), are not slated for development as part of a unified plan, which explains why the trial judge refused to allow the condemnation to proceed with respect to those petitioners' homes. *Kelo I*, 2002 Conn. Super. LEXIS 789, at *230-31 (noting, with respect to parcel 4, that "the uses here are . . . vague, shifting and noncommittal").

Second, the Italian Dramatic Club (and its exclusive clientele) was spared. *See, e.g., Kelo II*, 843 A.2d at 566. We are asked to believe that the same developers who could build around that structure could not build around the Brelesky home located immediately to the east, further from the center of the plot (*see* Plffs.' Exhibit TT), or indeed around any of the other homes located in that area.

Third, the mass condemnation in question here is clearly premature. The only way to determine if these owners had any holdout power is to know the nature of the proposed plans, none of which has been developed at this time. These takings might be fathomable if some current plan required the use of these parcels. But all the homes located on parcels 3 and 4A are acquired, as it were, "on spec." Given the absence of any concrete plan for these parcels, these properties have held up nothing at all.

This framework for evaluating the NLDC Plan shows that any conceivable public project does not require the condemnation of these homes. Sparing these homes *now* does not preclude the NLDC from seeking to condemn them later on. But there is no sensible reason to force a confrontation today that needlessly sacrifices subjective values (left uncompensated) to head off an assembly problem that will "perhaps" arise (if at all) in the future. Stated otherwise, the individuals in this case are holding out because they do not want their homes taken and their lives ruined if

forced from their homes after receiving paltry compensation that will not allow them to replicate their lives elsewhere. Faced with such impositions, everyone *should* hold out. The problem is not plot assembly. It is derisory compensation.

B. There Is No Net Public Benefit That Conceivably Justifies The Taking Of Petitioners' Homes In The Name Of Public Improvement.

Once their holdout argument fails, respondents will retreat to higher ground by claiming that the public use requirement may be satisfied by the prospect of large economic and social gain from economic development in general and this project in particular. The Connecticut Supreme Court evidently agrees: "We conclude that the public benefit of the taking in the present case is the dramatic economic benefit that the development plan is expected to have for the public in the New London community, namely, the massive projected growths in employment and tax and other revenues." *Kelo II*, 843 A.2d at 552. The projections were those referred to above: "(1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs" (*id.* at 510), as well as between $680,000 and $1,250,000 in tax revenues. *Id.*

A casual look at these numbers, apparently plucked from thin air, suggests that the projections are grossly inflated. Nowhere do respondents substantiate how the sites will be developed or what revenues they will generate. Nothing in the respondents' papers below or in the Connecticut Supreme Court explains what will galvanize the demand for these facilities when and if they are built. Although new jobs are treated as a benefit, they are better treated as costs associated with land acquisition, demolition, infrastructure, project management, and the like, which largely have been funded by a huge influx of public funds (some $73 million collected from individuals all across

Connecticut[10]), and are to be parlayed into a $1 per year ground lease given to the developer. *See Kelo II*, 843 A.2d at 554. Corcoran Jennison has yet to build any private projects, even though it has spent additional millions of its own in preliminary work. Moran, *NLDC in Default*, The Day, June 15, 2004, at C1; Moran, *Source of Frustration,* The Day, September 30, 2004, at A5. These public costs were incurred years before the associated project will have generated any income at all.

The taxation projections are drawn from thin air, too. Totally missing from this evaluation is the dimmest recognition of the time-value of money. The carrying costs of the invested money are ignored. The future and contingent nature of any possible revenue stream is ignored. The words "discounted to present value" appear nowhere in the decision of the Connecticut Supreme Court. The most rudimentary considerations of financial analysis are wholly disregarded in this most sorrowful of performances. Take them into account, and millions are added to the cost side (the carrying costs of $73 million are in the neighborhood of $2 or $3 million per year, for example.) And of course no mention is made of the huge private losses to the displaced people, as if they don't count in the grand social calculus. Yet even if the projected tax revenues fail to materialize, the loss of current tax revenues is certain.

In reply, of course, it will be said that great deference is needed when reviewing complex issues that legislatures and expert agencies have considered. That might be appropriate within the narrow confines of the grist mill cases, but it makes no sense to grant deference to a public body that has considered *none* of the financial and business costs and risks relevant to a minimally competent private planner. There may be nothing that this or any other court can do to protect Connecticut citizens from a scandalous waste of public funds. But there is much that any court could and should do

[10] Moran, *Vacant Lots*, The Day, January 18, 2004, at A1.

to make sure that these property owners are not forced to sell their property at rock bottom prices to support a program that will likely never deliver on its promises.

The situation looks only worse when the current history of this matter, available from newspaper accounts, is introduced. The initial assumption was that a luxury hotel would be built first to service the Pfizer facility next door. Moran, *Source of Frustration*, The Day, September 30, 2004, at A5 (hotel "was supposed to be the first phase of the project"). But Pfizer needed hotel accommodations the day it opened, not when some developer got around to building a hotel. And once Pfizer established alternative arrangements, the demand for the new hotel evaporated. Moran, *Hotel Plan Not Viable*, The Day, June 12, 2004, at C4.[11] As a result, the entire hotel venture has been put on hold until the summer of 2005, without any assurance that any hotel will be constructed at that time. Moran, *Source of Frustration*, The Day, September 30, 2004, at A5. In the interim, Corcoran Jennison continues to squabble with NLDC over the slow process of the entire plan. *See generally* Moran, *NLDC in Default*, The Day, June 15, 2004, at C1. And huge expenditures of funds will likely exhaust the revenues for the next phase of the project, so that $4 million of local monies may be needed to keep this sputtering project alive. Moran, *Vacant Lots*, The Day, January 18, 2004, at A1. Yet it is an open question whether the esplanade and marina, on which the success of any hotel is said to depend, will be constructed. *Id.* at A6 (noting agency has "jettisoned" marina plans "for lack of funds").[12] Ironically, it is also now

[11] While NLDC has blamed litigation for the stalled hotel plans, it is evident that the failure is a product of an unsound development plan and attendant cost over-runs. *See generally* Moran, *Vacant Lots*, The Day, September 30, 2004, at A6 & graphic (discussing NLDC's exhaustion of its $73 million budget and detailing major expenditures).

[12] *See also* Moran, *NLDC in Default*, The Day, June 15, 2004, at C1 (NLDC has "failed to complete a walkway along the Thames River that

an open question whether the strapped development budget contains funds needed to pay (at bargain prices) for the homes of the petitioners who are resisting this bulldozer. *Id.* ("With . . . council dollars tagged for roadwork and the riverwalk, the NLDC could have deficient funds to relocate tenants and tear down their homes."). The entire episode is a public disgrace.

As Justice Young sensibly noted in *Hathcock*, "To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a [for profit] private entity . . . might contribute to the economy's health is to render impotent our constitutional limitations on the . . . power of eminent domain. *Poletown*'s 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." 684 N.W.2d at 786. The respondents' position is inconsistent with the public use language as it would be interpreted either by those "versed in the law" (*see id.* at 787), or, for that matter, ordinary users of the English language.

The ultimate question, therefore, is whether the government action in this case will be blessed under the rational basis test, as the Court did in *Hawaii Housing Authority v. Midkiff, supra.* If *Midkiff* controls, this Court must acquiesce to the state government's action. But *Midkiff* is distinguishable: It did not involve changing patterns of use, as here, but rather a "land oligopoly," which involves issues of market structure that are in no wise implicated in this case. 467 U.S. at 241-42. *Midkiff* itself relied on *Cincinnati v. Vester*, 281 U.S. 439 (1930), which held that condemnations of excess land do not qualify as a permissible public use. *Midkiff*, 467 U.S. at 241 (citing *Vester*, 281 U.S. at 447). *Vester* makes it clear that some immediate purpose is needed to justify the taking. "Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained

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must, according to the building permits obtained by Corcoran Jennison, accompany the hotel").

on a bare recital." *Id.* That is what is at stake when there are at most inchoate plans for new buildings, and in the case of parcel 4A, for nothing in particular at all.

Yet, while this case is distinguishable from *Midkiff*, *Midkiff* itself should be overruled precisely because its broad test transforms "public use" into any "conceivable public purpose"—allowing all sorts of inconceivable and improper schemes to slip through the judicial net. For example, the Hawaii statute at issue in *Midkiff*, Haw. Rev. Stat. § 516 (1976), used a set of pro forma findings about an oligopolistic industry to usher in the forced transfer of land from landowners to tenants at bargain basement prices. *See Midkiff v. Tom*, 471 F. Supp. 871, 883-84 (D. Haw. 1979) (invalidating portions of the compensation formula found in Haw. Rev. Stat. § 516-1(14) (1976)). Yet, ironically, no one claimed that the leasehold rents were set at above competitive levels, as the claim of oligopoly implies.

The forced buyouts authorized in *Midkiff* did not respond to any holdout or assembly problem, unless every contractual negotiation for a lease buyout or renewal is said to be so afflicted. Likewise, the statutory finding that the forced acquisition of land "will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State" (Haw. Rev. Stat. § 516-83(5) (1976)) was pure boilerplate, wholly unintelligible and incompatible with any economic theory: After all, political struggle and high administrative costs, without any allocative improvement, only reduce social welfare. Worse still, the state in *Midkiff* turned itself into a pawn for the lessees, who had to provide the money for the property up front or supply iron-clad guarantees before the Housing Authority would order condemnation. *See* Haw. Rev. Stat. § 516-33(a)(4) (1976). The entire scheme was a transparent effort to dress up a transfer of property from A to B with some high-sounding public purpose. Yet, ironically, the only way to reduce high prices was to expand the supply of housing (which these same sitting tenants would oppose!) by releasing for development some portion of the large tracks of

Hawaiian land bottled up under the state's restrictive system of land use regulation. That restrictive system, in turn, was made possible in part by this Court's decision in *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), with its deferential approach to zoning.

The romantic assumption that legislatures act only for the common good leads to travesties like this New London project. This Court should follow the lead of the Michigan Court in *Hathcock* and overrule *Midkiff* insofar as it holds that any assertion of a generalized public benefit should be routinely blessed under the rational basis standard of review.

CONCLUSION

For the foregoing reasons, the judgment of the Connecticut Supreme Court should be reversed.

Respectfully submitted.

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December 3, 2004